IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

FRIDAY, THE 26TH OCTOBER 2007 / 4TH KARTHIKA 1929

RFA.No. 147 of 2003(C)

OS.367/1998 of PRINCIPAL SUB COURT,ERNAKULAM
.....

APPELLANT/DEFENDANT

THE EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD., A GOVT. COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956 HAVING ITS REGISTERED OFFICE AT EXPRESS TOWERS, 10TH FLOOR, NARIMANPOINT MUMBAI-400021 & HAVING ITS BRANCH OFICE AT HDFC BULDS,RAVIPURAM, COCHIN-16,REP.BY ITS BR.MANAGER

BY ADV. SRI.V.M.KURIAN
SRI.A.V.THOMAS
SRI.MATHEW B. KURIAN
SRI.K.T.THOMAS

RESPONDENTS: PLAINTIFF

HARRISONS MALAYALAM LTD., A COMPANY OINCORPORATED UNDER THE COMPANIES ACT 1956 HAVING ITS REGD. OFFICE AT 24/1624, BRISTOW ROAD, WILLINGDON ISLAND, COCHIN-03, REPRESENTED BY ITS MANAGER-LEGAL AND POWER OF ATTORNEY HOLDER MR.V.VENUGOPAL.

BY ADV. SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.A.K.JAYASANKAR NAMBIAR
SRI.P.BENNY THOMAS
SRI.ANIL D. NAIR

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 26/10/2007, THE COURT ON 26/10/2007 DELIVERED THE FOLLOWING:

P.R.RAMAN & V.K.MOHANAN, JJ.

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R.F.A. No.147 of 2003

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Dated this the 26th day of October, 2007.

JUDGMENT

Raman, J.

The defendant in O.S. No.367/1998 on the file of the Subordinate Judge's Court, Ernakulam is the appellant herein. The suit is one for recovery of money instituted by the respondent as plaintiff. The plaintiff is a public limited company carrying on various business activities. The appellant is a Government of India company registered under the Companies Act. It is the case of the plaintiff that pursuant to a meeting held between the Indo-Kazakh Joint Commission at New Delhi and upon reference by the Indian Embassy at Almaty, a contract dated 26.8.1993 was entered into by Rassik Wood Worth Limited (RWL) with a Kazakh Government Organisation known as RVO Kazpischerpromsyria for export of 3000 metric tonnes of tea on 120 days credit basis. As per the contract, the payment was to be made by barter exchange of goods within 120 days from the date of delivery and interest was also payable at 15% per annum for the period of non-payment if any. One of the terms included in the contract was that a guarantee will be given by the Ministry of Foreign

Economic Relations, Kazaksthan. A list of goods available with the buyer for barter exchange was attached to the contract. There was an addendum to the contract as per which if the contract for barter supply of goods cannot be finalised or if delivery or shipment is not made within the stipulated period, then the buyer has to pay the seller for the delivered goods in US dollars. This was further amended by another addendum whereby Rassik Wood Worth was permitted to export tea through its nominated associates. The said company Rassik Wood Worth Ltd. appointed Assam Brook Limited as also the plaintiff and TATA Tea company as their nominees for discharging their obligation of exporting tea in terms of the contract. The plaintiff has thus in terms of the nomination so made, exported 500 metric tonnes of tea to the buyer. There was insurance coverage for the shipment of this 500 metric tonnes of tea for US dollars 12,50,000. The shipment was also covered by monthly declarations against defendant's policy and the coverage was for 75% of the value. Accepting the condition, the plaintiff paid the premium amount of Rs.5,89,844. Eventually, the buyer could not repay in barter as no finality was reached thereon and hence subsequent to the expiry of 120 days, part payment was made by the buyer in US dollars.

Thereafter they defaulted in making the full payment. As a result, the plaintiff invoked the guarantee and raised a claim against the defendant for payment in terms of the policy issued. But the defendant repudiated the claim under their letter dated 8.9.1995 on the premise that the coverage was only for barter exchange. According to the plaintiff, the grounds on which the claim was repudiated by the defendant were not justified and opposed to the terms of guarantee executed by them. According to the plaintiff, they have satisfactorily carried out their obligations under the policy and cover. Since they received only an amount of 5,11,451 dollars from the buyer against the total amount of 12,50,000 dollars due from them and since the Ministry of Foreign Economic Relations of Kazaksthan failed to honour their guarantee, the plaintiff claimed the balance amount due towards 75% as guaranteed by the defendant. It was worked out at Rs.1,70,26,133/-, which represents 75% of Rs.2,27,01,510/-, which according to the plaintiff was the balance outstanding as on the date of plaint. The plaintiff therefore claimed the said amount along with interest thereon at 15% per annum. The interest was also worked out from the date of the claim till the filing of the suit at Rs.78,74,587/-. The total amount comes to

Rs.2,49,00,720/- with future interest at 15%.

2. The defendant in the written statement repudiated the claim of the plaintiff. According to them, in terms of clause 5 of the policy read with Annexure-I and the special condition No.7 of Annexure-II of the Schedule of premium attached to and forming part of the policy, Kazaksthan being one of the countries which were not covered under the insurance policy, the insured has to apply for and obtain from the defendant specific written approval for each of such shipment and therefore, the plaintiff was obliged to seek specific approval from the defendant at the time of such shipment. Such approval could be granted with additional stipulations or conditions as the case may be. According to them, they have specifically stipulated regarding the manner of payment by way of barter to be made within 120 days from the date of delivery and therefore, the payment by dollar is not an acceptable mode of payment. It was also their case that a list of goods available for barter was given in the said contract. According to them many a country, export to which are considered as patently bad risks or with very high risk owing to bad economic and political situations in those countries, are categorised as restricted cover countries and Kazaksthan is

one such country which comes under the restricted cover countries. The object of providing a safeguard in this regard by insisting for a special approval at the time of shipment to such restricted cover countries is with a view to enable the defendant to stipulate certain conditions having due regard to the circumstances at the time of effecting the shipment. Hence in their letter of approval dated 7.10.1993 it was a specific condition that the payment of delivered goods shall be made by barter exchange of goods within 120 days of the date of delivery. According to the defendant, the contract for barter exchange did not work out because the plaintiff did not accept the goods on the pretext that neither they nor their agents require the goods. If the plaintiffs had declined to accept the barter of goods on their on volition on the ground that they had no market for those goods, the loss incurred from there is only a trading loss not covered by the policy issued by the defendant. They also denied their obligation to pay any interest as demanded.

3. The plea as raised by the plaintiff and the defendant to the extent they are relevant for the purpose of this case have thus been stated above. On the pleadings between the parties, several issues were raised by the court

below. On the side of the plaintiff Exts.A1 to A32 were marked and on the side of the defendant Exts.B1 to B3 were marked. The defendant was examined as DW1. There was, however, no oral evidence on the side of the plaintiff.

4. The court below after an analysis of the materials available on record held that:

i) the suit is not barred by limitation.

ii) that Government of Kasakisthan was placed under the restricted category at the time of shipment. Ext.B1 policy produced in the case shows that the insurance cover provided under the policy does not apply to shipments to countries placed under restricted cover unless prior specific approval has been obtained. Pursuant to Ext.A3 application submitted by the plaintiff for covering the shipment to Kasakisthan, defendant issued Ext.A20 approval. Ext.B1 policy read along with Ext.A20 applies to Government of Kasakhstan also.

iii) The risk relating to export of tea to Kasakisthan was subject to six additional conditions as per Ext.A20, which were:

"1. The payment for delivered goods shall be made by

Barter Exchange of goods within 120 days from the date of delivery;

2. The liability of ECGC Ltd. will arise only after default has been established on the guarantee of the Ministry;

3. Percentage of cover will be 75% of the loss;

4. Waiting period for filing of claim will be 4 months from the due date of payment;

5. Harrison Malayalam Ltd. have the right to export in their own name as per the contract and the bills of exchange shall be raised in their name and also have a right to recourse against buyer in the event of any default;

6. A premium rate applicable will be at the rate of 151 paise per Rs.100/- of the gross invoice value."

iv) The barter exchange of supply of goods could not take place due to the reason beyond the control of the plaintiff within 120 days provided under Ext.A1. It was found that on the strength of Ext.A25 every endeavour was made by RWL for finalising or making a concluded contract for barter supply of goods. It was also held that merely because certain items were specified in the list, it is very difficult to suggest to the plaintiff that whatever offer is made in barter exchange of goods, has to be accepted by the plaintiff or its agents without any objection whatsoever. Reasonable

thinking and logic would lead to the inference that in case the goods offered by the buyer in barter exchange did not require in India, the right to insist amount in hard currency was fully justified. In this case there is no evidence to show that there was a concluded contract for barter exchange of goods and it is due to the reasons beyond the control of the plaintiff that they could not effect the barter exchange of goods within 120 days for the reason that the goods offered by the Government of Kasakisthan were not required in India. It was also found from the evidence of DW1 that the Government of Kasakisthan did not honour their commitment under the guarantee. Pursuant to various correspondence, certain amounts were paid by the buyer in US dollars towards the amount due to the plaintiff and other exporters and after adjusting the said amount, plaintiff filed the suit. On the basis of the findings on various issues as indicated above, the court below decreed the plaint claim with reduced interest at 9% from 9.6.1995 till date of suit and thereafter at 6% till date of realisation to be recovered from the defendant and its assets. Impugning the said judgment and decree, the defendant has preferred this appeal.

5. Learned counsel Sri.V.M.Kurian appearing on behalf of the

appellant contended that Ext.B1 policy read with Ext.A20 would clearly show that the appellant were insisting that the payment by the buyer should be only by barter. It is also his case that during the period of 120 days the buyer had offered the goods which under one pretext or the other the plaintiff was refusing to take delivery. He, therefore, justifies repudiation of the claim made by the appellant.

6. Admittedly the plaintiff had exported tea to the buyer at Kazakhstan as a nominee of Rassik Wood Worth Ltd. Out of the total contracted quantity the plaintiff exported 500 M.Tonnes of tea and the balance quantity were allotted to the other exporters. All the exports are covered by insurance coverage. In the present case, Ext.B1 is the policy issued in favour of the plaintiff. On the face of Ext.B1, it contains a clause as per which the insurance cover provided under the policy will not apply to shipments to countries under Restricted Cover (special condition 7 in the premium schedule as amended from time to time) unless prior specific approval has been obtained. Such a clause is contained in clause (f) of the policy as well. As per the policy condition the risk insured is as follows:

"(i) .....

> (ii) the failure of the buyer to pay to the Exporter within four months after the due date of payment the gross invoice value of goods delivered to and accepted by the buyer, or
>
> (iii) the failure or refusal on the part of the buyer to accept goods which have already been exported from India, where any such failure or refusal is not excused by and does not arise from or in connection with any breach of condition or warranty on the part of the Exporter or from any other cause within his control; and provided also that the Corporation is satisfied that no good purpose would be served by the institution of legal proceedings against the buyer in respect of his said failure or refusal, or
>
> ....."

There is no dispute that there was a failure on the part of the buyer to pay to the exporter within four months after the due date of payment of gross invoice value of goods delivered to and accepted by him, but the export being to a country which is a country placed in a restricted cover, according to the appellant, the payment should be by barter and unless there is a failure to pay by barter within the period of 120 days, there cannot be any failure on the part of the buyer and hence there is no obligation on the part of the appellant to pay the amount as their obligation will arise only when there is a failure to pay in the manner provided for. As per clause 5 of the policy under caption "Schedule Conditions" it is stated that the application

of the policy to shipments made to buyers in any of the countries specified in the Schedule hereto shall be further subject to (a) the special conditions (if any) stated in the 3rd column in the said Schedule hereto opposite the name of that country, and (b) such other special conditions (if any) including any alterations to the said Schedule as may be notified from time to time in writing by the Corporation to take effect from the date specified in the notice (not being earlier than the date of such notice). According to the appellant, the specific condition as respect to the shipment to a country placed under restricted area is as per their letter dated 21.10.1993, Ext.A20. In Ext.A20 letter there is a reference to the letter dated 7.10.1993 of the plaintiff-respondent and their correspondence along with credit limit application resting on the subject. It admits of the fact that M/s.Rassik Woodworth Ltd. vide their letter dated 6.10.1993 have already nominated the plaintiff to ship 500 M.Tonnes of tea for a value of US dollars 12,50,000/- to M/s.Kazpischepromsyrio, Kazakhstan. It proceeds that they have pleasure in approving the above transaction subject to the following terms and conditions. There are six conditions which are as follows:

"1. The payment for delivered goods shall be made by

Barter Exchange of goods within 120 days from the date of delivery;

2. Our liability will arise only after default has been established on the guarantee of the Ministry;

3. Percentage of cover will be 75% of the loss;

4. Waiting period for filing of claim will be 4 months from the due date of payment;

5. You have the right to export in your own name as per the contract and the Bills of Exchange shall be raised in your name and also you have a right to recourse against buyer in the event of any default;

6. A premium rate applicable will be at the rate of 151 paise per Rs.100/- of the gross invoice value."

The original agreement entered into by the principal namely, Rassik Woodworth Ltd. with the buyer is Ext.A1 produced in the case. Clause 6 which is relevant for the purpose of our case reads as follows:

"6. Payment

The payment for delivered goods shall be made by Barter Exchange of goods within 120 days from the date of delivery being effected by the seller. Plus interest for the period of non-payment 15% per year. The above terms will be covered by a guarantee for payment by the Ministry of Foreign Economic Relations of Kazakhstan.

For Barter exchange of goods Buyer presently has

available for offer goods as per supplement N2 to the present contract."

The above clause is strictly in conformity with clause 1 of Ext.A20. Ext.A1 is dated 26.8.1993. On the same date there was an addendum to the contract which provides that "in case the payment terms as per clause 6 of the contract are not possible that is to say, if the contract for barter supply of goods cannot be finalised for any reason or if delivery of shipment under such a contract is not made within the stipulated period, then the buyer shall pay to the seller for delivered goods in US dollars within 120 days from the date of delivery being effected by the seller. This payment is to be made through remittance by the buyer of the contracted amount of delivered tea, plus interest at 15% per year to the Bank Account of the Seller at Canara Bank Janpath New Delhi, India.

The above payment will be guaranteed by the Ministry of Foreign Economic Relations of Kazakhstan.

This addendum forms an integral part of the Contract dated 26.8.1993."

In accordance with the above term, the Ministry of Foreign Economic

Relations of Kazakhstan had guaranteed the repayment. But so however, they did not repay the amount as per the guarantee. The appellant is aware of the clause as per the added addendum, but while Ext.A2 was issued, it only reiterates that the payment for delivered goods shall be made by barter exchange of goods within 120 days from the date of delivery. In other words, there was no specific condition in Ext.A20 disapproving the addendum clause as referred to above. On the other hand, as we have seen, the contract Ext.A1 read along with addendum contains a clause that the payment for delivered goods shall be made by barter exchange of goods within 120 days from the date of delivery consistent with conditions in clause 1 of Ext.A20. Therefore, it cannot be said that when there is a failure to pay by barter within 120 days, the further clause that the same shall be paid in dollars is in no way an objectionable clause even going by the conditions contained in Ext.A20. According to the appellant, during the payment period of 120 days, the buyer had offered certain goods as was available with them as listed in Schedule 2, but which the plaintiff did not accept under one pretext or the other. This is stated to be another reason for repudiating the claim. In this regard we may refer to one of the letters

produced in the case as Ext.A25 written by Rassik Woodworth Ltd., the principal, when the contract was entered into by the buyer to the appellant herein on the date 4.7.1994. As per clause 2 of the said letter, the appellant was informed that the contract for supply of tea to Kazakhstan was to be made as a first alternative by Barter supply of goods required by India from Kazakhstan and the addendum was made to safeguard the interest of the exporter that in case the barter supply does not take place for any reason, whatsoever, then it will enable them to receive payment in hard currency. In November the plaintiff has offered various items in barter exchange. But neither the principal nor their associates, nor MMTC, nor any other potential buyers wanted their products and copies of the relevant letters were also enclosed there. It is also stated that RBI was also informed of this in order to effect necessary changes for banking transactions. It is not disputed that the RBI has given necessary sanction in this regard. It may be seen in this connection that various letters were written by the exporter or their associates to MMTC inquiring about the market conditions and the requirement of the type of goods within the list. The correspondence continued, but did not reach any finality. Normally the exporter expects

specific goods by barter of that is required by them so as to enable them to market the same and get the price from out of the sale of such commodities when received in India. Of course when there is a list of such items provided, they cannot possibly demand any goods outside the list. But within the list whatever items are mentioned thereunder, normally one expects the buyer to supply goods as may be required by the exporter at the time of payment. The conditions may vary or circumstances may change regarding the requirement of any particular goods as it cannot be said that the very same goods would continue to be in demand for all the time to come. As a matter of fact, both the exporter and the buyer have understood the relevant clause in that manner only. If there was no option available to the exporter to insist for any particular goods to be supplied by the buyer, then necessarily the buyer would have insisted the exporter to accept the goods offered by the buyer and refused to pay any hard currency. On the contrary, in this case the buyer on the expiry of the period for payment and in view of the fact that the barter payment could not be finalised, had already paid in hard currency in part, but not fully. This only reduced the liability of the guarantor. Therefore, only remaining unpaid

amount is required to be considered for payment by the guarantor to the agreed percentage as per the policy issued. In the absence of any such case for the buyer, it cannot be said by the appellant who is not a party to the contract that the exporter was bound to accept whatever goods were offered by the buyer by way of payment in barter and on that basis repudiate the claim.

7. The court below has analysed the entire evidence in the case and discussed in detail all the contentions. We do not find that the two conditions on which the repudiation was made are justifiable. We may in this connection refer to the decision of the apex court in ABL INTERNATIONAL LTD. V. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD. (2004) 3 SCC 553. It is in respect of the very same contract that the Rassik Woodworth Ltd. had agreed with the buyer to export tea required by them and it is pursuant to the said contract that part of the quantity was permitted to be exported by three nominees including the plaintiff herein. It is in respect of the other two nominees that the case came up for consideration before the apex court. Originally ABL International Ltd., the nominee of the RWL, had filed a Writ Petition before the Calcutta

High Court. It was contended that the writ petition is not maintainable as it involves enforcement of contractual obligation. But this contention was not accepted by the learned Single Judge of the Calcutta High Court who held that though the dispute between the parties arose out of the contract, first respondent (appellant herein) being a part of the State for the purpose of Article 12, is bound by the terms of the contract; therefore, for such non-performance, a writ was maintainable. The writ was accordingly allowed and directions as prayed for were granted. The Division Bench, on appeal, however, reversed the finding of the learned Single Judge and held that the claim of the appellant involving disputed questions of fact could not be adjudicated in a writ proceeding under Article 226, hence, set aside the judgment of the learned Single Judge. It is against the said decision that a Special Leave was obtained and an appeal was filed as Civil Appeal No.5409/1998. The detailed facts are stated in paragraphs 1 and 2 of the said judgment. We do not find any difference on facts from the present case. But according to the appellant, there was no plea raised therein based on the special conditions like Ext.A20 in the case on hand and according to him, since evidence have been adduced, both oral and documentary, and in

the light of the special conditions contained in Ext.A20, the facts are distinguishable. Paragraph 30 of the judgment onwards deals with undisputed facts which are; that the appellant has agreed by the contract of insurance to insure the risk of non-payment of its consideration for the tea exported by the plaintiff to Kazak Corporation, that the plaintiff had exported 500 metric tonnes of tea to Kazakistan, that Kazak Corporation did not pay the consideration for the tea received by it in cash in US dollars, that Kazak Government stood as guarantor for prompt payment for the goods received by the Kazak Corporation and that the said Government failed to honour its guarantee, and that the RBI permitted the plaintiff to receive cash consideration in the form of US dollars instead of barter payment. What is disputed is the obligation of the appellant to cover the risk of non-payment of consideration by cash in US currency on the ground that the risk covered by them is a risk arising out of non-supply of goods by the barter method only. Thus the contention as is now raised to repudiate the claim is the same as considered in the decision of the apex court. After noting the above facts, the relevant clauses contained in the contract were referred to.

8. Paragraph 39 refers to the payment clause which is identical with the payment clause as in Ext.A1. There was an amendment on the very same day when the contract was signed by the exporter and the Kazak Corporation by an addendum i.e. on 26.8.1993 itself. The addendum extracted in paragraph 39 of the said judgment is identical in all respects with the addendum contained in Ext.A1 contract. After referring to the above clause, in paragraph 41 the apex court held as follows:

> "If we read the original clause 6 and the addendum together, it is crystal clear that for some reason or the other the parties agreed to amend original clause 6 by the addendum which amendment brought about a significant change in the mode of payment of consideration. In the original clause 6, it is seen that the Kazak Corporation agreed to pay for the delivered tea by barter of goods. This sole mode of consideration came to be altered by the addendum by which parties agreed if the payment of consideration by barter of goods cannot be finalised for any reason, the buyer, that is, the Kazak Corporation agreed to make the said payment in US $ within the stipulated period of 120 days of the delivery by the exporter. This addendum replaced the original clause 6 and from the language of the addendum it is clear that the amended clause 6 became an integral part of the original contract in place of the original clause 6. The language of the addendum clearly shows that the payment of consideration by barter supply of goods was no more the sole mode of consideration and if, for any reason whatsoever, such payment by barter did not materialise between the parties then the payment had to be made in cash in US$. In our opinion, there can be no two possible interpretations as to

the meaning of this amending clause (addendum). This was also the understanding of the Kazakhstan Corporation which is established by the fact that after the failure of barter it did pay a part of consideration in US$; this is also the understanding of the Government of Kazakhstan which guaranteed the payment of such consideration which is evident from the letter of the Ministry of Foreign Economic Relations of the Republic of Kazakhstan dated 18.3.1994. In the said letter the said Government while admitting the default in payment of consideration in clear terms stated:

> "But some difficulties related to introduction of the national currency, execution of primary internal payments between enterprises and budgetary deficit prevented the Kazak party from timely repaying of the credit."

It was held by the apex court:

> "It is also clear that the first respondent while issuing the policy of insurance did know that payment of consideration by the Kazak Corporation could be by two modes: (a) by barter, and (b) by cash and non-payment of consideration by either mode was to be covered by the said contract of insurance.
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> It is also an admitted fact that the Kazak Corporation did offer only some goods and not all items included in the schedule to the appellants initially as a barter payment, but on evaluation made by the appellants, they were not acceptable to the appellants. Therefore, payment of consideration by barter of goods could not be finalised as contemplated in the amended clause 6 of the export contract and in lieu of the same, the Kazak Corporation agreed to pay in US $ and in fact did make part-payment of the same in US $, but thereafter it defaulted in the payment of the balance amount. It is also an admitted fact that

> the Kazakhstan Government which guaranteed the payment of consideration for the exported goods while admitting its liability also defaulted for its own reasons, consequently, the appellants could not get the full consideration for the tea exported by them."

9. The above facts are in no way different from the factual situation available in the present case. We have already referred to Ext.A20 and we are of the firm opinion that Ext.A20 in no way could bring about any difference on facts from the case considered by the apex court in the aforesaid decision. In Ext.A20 except to reiterate that the payment should be by barter providing for 120 days period, it did not disapprove of the alternate mode of payment, though they had knowledge about the addendum which provided for the alternate mode of payment. In other words, even though there were two modes of payment namely, in barter and on failure to do so, by hard currency being the alternate mode, in Ext.A20 except to reiterate the payment by barter, they did not specifically disapprove of the alternate mode when the buyer could not repay it in barter within the period as mentioned. Further, the fact that buyer did not have all the commodities in the list as in the present case is yet another circumstance which shows that if only all the items were available, possibly the parties

could have finalised the barter payment and as in the present case, there was a failure to finalise the barter system in the case considered by the apex court. The reason for the repudiation made was also referred to in paragraph 45 of the said judgment which is as follows. The appellant had repudiated the claim taking the stand that it had covered the risk of non-payment by barter only and the said mode of payment was changed by the appellants without prior consultation with the first respondent, therefore, this change amounted to a breach of an insurance agreement, hence, it had no liability for the loss suffered by the appellants. In this regard the apex court referred to the finding of the learned Single Judge of the Calcutta High Court in the following lines:

> "There cannot be any doubt that barter system of payment was adhered to but the addendum clause in the contract clearly stipulates a situation that in the event same cannot be agreed upon, there could be a default if the Kazakhstan Government failed to pay in terms of its guarantee to the first respondent in US $. Default clause appears to be unequivocal."

Thereafter, the learned Single Judge having perused the various correspondence between the parties and noticing the fact that the Kazakhstan Government also admitted its failure to comply with the

guarantee, came to the conclusion that there was nothing on record to show that even when there is a rejection of payment by barter, the plaintiff is required to consult the appellant. In the light of the terms of the contract and as noticed in clause 6, as amended by the addendum, the mode of payment is not by barter of goods alone, it also contemplates alternate mode of payment of consideration. The contract was finalised between the buyer and the exporter with the addendum clause and it is towards the said contract that the policy of insurance was also issued. The fact that there was such an addendum clause providing for an alternate mode was thus known to the appellant despite it did not raise any objection to the inclusion of the addendum clause in the agreement. As such it cannot be contended that because of Ext.A20 the mode of payment could only be by barter and that they have not accepted the alternate mode of payment in currency. Since there was already a default on the part of the Kazak Corporation to pay for the goods received and the Kazakhstan Government having failed to fulfill their guarantee, it attracts the terms contained in the insurance contract whereby the liability of the appellant has arisen. We do not find that the judgment and decree passed by the court below in such

circumstances is any way illegal or liable to be interfered with in this appeal. Accordingly, we dismiss this appeal. However, in the circumstances of the case, the parties shall bear their respective costs in this appeal.

P.R.RAMAN
Judge

V.K.MOHANAN
Judge

pms